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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 643

JAMES A. NOE, HARRY ALLSMAN, RAYMOND F. HUFFT, AND JAMES A. NOE, JR., d b a JAMES A. NOE & COMPANY, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

LOYOLA UNIVERSITY (*Intervenor Below*)

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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### OPINIONS BELOW

The decision of the Federal Communications Commission released July 13, 1956 is printed at Joint Appendix pp. 377-542. The Memorandum Opinion and Order denying Petitions for Rehearing is printed at Joint Appendix pp. 543-551. The opinion of the Court of Appeals for the District of Columbia Circuit is reported at — F. 2d —, and is set out in Appendix A, *infra*.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1958 (Appendix A, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254 (1).

## QUESTION PRESENTED

Whether Loyola University, by reason of its connection with the Society of Jesus, is the "representative" of an "alien" and is a corporation whose stock is "owned of record or voted" by "representatives" of aliens, within the meaning of Section 310(a) of the Communications Act of 1934, 48 Stat. 1086, as amended, 47 U.S.C. 310(a) (1952), rendering it ineligible to hold a television license?

## THE STATUTE INVOLVED

The single statutory provision out of which this controversy arises is Section 310(a) of the Communications Act of 1934, 48 Stat. 1086, as amended, 47 U.S.C. # 310(a) (1952). The pertinent portion of the text of Section 310(a) recites as follows:

> "(a) The station license required hereby shall not be granted to or held by—
>
> "(1) Any alien or the representative of any alien;
>
> "(2) Any foreign government or the representative thereof;
>
> "(3) Any corporation organized under the laws of any foreign government;
>
> "(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a

foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

"(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license."

Section 3 (j) of the Act which defines terms used in the Act, unless the context otherwise requires, states:

"(j) 'Corporation' includes any corporation, joint-stock company, or association."

## STATEMENT OF THE CASE

This case involves a specific statutory prohibition against alien control of radio and television facilities. It is not merely another case seeking Supreme Court review of the limits of the discretion allowable to the Federal Communications Commission in awarding a television channel to one of several competing applicants. It presents the question directly of whether a non-profit educational and religious corporation composed of priests who are members of the Society of Jesus is an alien or representative of an alien or is a corporation whose stock is owned of record or voted by representatives of aliens within the meaning of Section 310(a) of the Communications Act of 1934, as amended, thus rendering it ineligible to hold a television license.

Petitioner, James A. Noe & Company, is a partnership formed in 1953 for the purpose of seeking authority from the Federal Communications Commission to construct a television station using channel 4 in New Orleans, Louisiana. (J.A. 465)

Because there were two other applicants, the Times-Picayune Publishing Company and Loyola University, applying for the same channel, the Commission designated the three applications for consolidated hearing. In its Order designating the applications for hearing the Commission found that Loyola University was financially, legally and technically qualified to hold a television license and established as hearing issues the question of Noe & Company's financial qualifications and on a comparative basis which applicant's proposal would best serve the public interest, convenience and necessity. (J.A. 378-379)

At the hearing the Examiner ruled that while she would not hear evidence offered for the purpose of proving that Loyola was not legally qualified, she would receive evidence dealing with the relationship of Loyola University, a non-profit educational and religious corporation, and the Society of Jesus, on the theory that such evidence was relevant to the question of whether Loyola University was controlled by the Society. She reasoned that the question of control had relevance in the evaluation of the comparative criteria of preference as between applicants.

The record thus discloses the essential facts upon which the argument that Loyola University is not legally qualified to hold a license is based.

Loyola University is an educational corporation chartered by the State of Louisiana in 1912. It is a

non-profit, non-stock corporation; it has no shares. Under the corporate charter its directors must be priests of the Society of Jesus attached to Loyola University. (J.A. 677) Administration of the corporation is vested in the Board of Directors which consists of a President, Vice-President, a Treasurer and a Secretary "and not less than one or more than three other members of the Corporation, who shall be appointed by the President of this Corporation from among the members of the Corporation." (J.A. 387) The President is virtually all-powerful since the charter provides that "All legal acts of this Corporation shall be decided by a majority vote of the members present, provided such acts have the approval of the President of the Corporation." (J.A. 387) In the event of the death of any member of the corporation, his heirs or assigns shall have no right of ownership in the property or effects of the corporation. (J.A. 389) The same result occurs if any member of the corporation ceases to be a member "for any reason whatever," presumably including transfer to another religious community or expulsion from the Society of Jesus. (J.A. 389)

The Society of Jesus, of which every member of the Board of Directors of Loyola University must also be a member, is a voluntary association of Roman Catholic priests founded in 1540. The administration of the Society is by provinces. Within the provinces individual corporations are created for the purpose of operating churches, schools, colleges, etc. Loyola University is within the Southern, or New Orleans Province which geographically extends from South Carolina to New Mexico. (J.A. 85) Total membership in the Society is about 32,000 of whom about 7,500 reside in the United States, approximately 350 to 400 in the New Orleans province and 42 in the New Orleans

religious community of which Loyola University is a part. (J.A. 573) As a hierarchical organization control of the affairs of the Society is vested in a Superior General with headquarters in Rome, Italy. The present incumbent is a citizen of Belgium. (J.A. 579, 589) Final authority to expel a member from the Society rests with the Roman Catholic Pope at Rome. (J.A. 574) The general practice is that a Rector of a religious community will not serve more than two consecutive three-year terms in any one post. (J.A. 599) Members of the Society may not own property or stock in corporations. (J.A. 585)

The power of the Society of Jesus through its Superior General and hierarchical organization to control Loyola University derives from the fact that the head of the religious community at Loyola—The Rector—is *ex officio* the President of the University and corporation. He is appointed as head of the religious community by the Superior General. The Rector has the power to appoint one to three members of the Board of Directors and to submit a list of names to the Provincial Superior, from which list the latter appoints the other three leaders of the religious community, who *ex officio* become officers of the corporation and members of the Board. While the Provincial Superior is at the present time an American citizen he is himself appointed to his position by the Superior General in Rome, a Belgian citizen. (J.A. 677-678) Thus every priest who is an officer or director of Loyola University or who can become an officer, director or member of the Loyola University corporation owes his position either to direct appointment by the Superior General, a Belgian citizen in Rome, Italy, or to appointment by a person appointed to his own position by the Superior General.

On the basis of these and other facts not now pertinent the Hearing Examiner in a decision released July 7, 1955, recommended grant of a construction permit to the newspaper applicant, Times-Picayune Publishing Company, and the denial of the applications of Noe & Company and Loyola University. In her decision she found that "control by the Society of Jesus over the selection, appointment and tenure of the officers and directors of Loyola has been clearly established . . ." and noted that "this is not due to any provision of canon law but to the express provisions of the charter of Loyola granted by the State of Louisiana at the request of the incorporators of Loyola." (J.A. 347-348).

By decision released July 13, 1956 (J.A. 377-542), the Commission reversed the Hearing Examiner's Initial Decision, denied the applications of both Noe & Company and the Times-Picayune, and granted the application of Loyola. In reaching its conclusion the Commission found it unnecessary to consider the jurisdictional issue of the legal qualifications of Loyola under Section 310(a) because in its view the issue had not been presented "in the manner prescribed by the Rules of the Commission." (J.A. 381). In its Memorandum Opinion and Order released July 1, 1957 (J.A. 543-551), denying Petitions for Rehearing, the Commission made no further reference to the jurisdictional argument.

Thus the issue of the legal qualifications of Loyola University under Section 310(a) to receive and hold a television license was for the first time considered on its merits by the Court of Appeals.

Jurisdiction of the United States Court of Appeals for the District of Columbia Circuit was invoked under

Section 402(b)(1) and 402(b)(6) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 402(b)(1) and 402(b)(6)) and Rule 37 of the Rules of that Court.

On the basis of very limited selections from the legislative history of Section 310(a) the Court of Appeals held that although the Section was directed against alien control of our communications facilities, this prohibition was primarily based upon the idea of preventing alien activities against the Government during time of war. It found that the relationship of Loyola to the Society of Jesus "hardly seems to endanger our national security." (J.A. 679) The Court said that even though it recognized the Society of Jesus was a hierarchical organization and that within the organization some power and control is vested in persons not directly a part of the University and a few of whom reside abroad, nevertheless this control has never been used in the past "to impinge on the independence of the University in the operation of its radio station." (J.A. 679)

Hence, since Section 310(a) was put in the Act to guard against alien control and not the mere possibility of alien control, the Court concluded that Loyola "seems to us to fall neither within the letter nor the spirit of the statute." (J.A. 680)

The Court also found no impropriety in the Commission's differentiation between Loyola as an educational and religious organization and the "usual business corporation, in applying its customary comparative criteria." While in business corporations the power to appoint and promote might require consideration of the appointing authority as a principal, the court felt

that a distinction was justified when dealing with an ecclesiastical hierarchy. (J.A. 680)

This petition is filed seeking review of the erroneous decision of the Court of Appeals.

## REASONS FOR GRANTING THE WRIT

### I. This case presents an important question of federal law regarding foreign influence in communications which has not been, but should be settled by this Court.

Never before in the history of the Communications Act has this court or any other federal court (except in the present case) been called upon to interpret and apply the provisions of Section 310(a) in connection with ownership or control of communications facilities in this country by organizations based outside this country.

It is true that the Federal Communications Commission has on many occasions licensed non-business organizations. The Court of Appeals decision cites five such cases involving respectively a municipal corporation, the Baptist General Convention of Texas, Reorganized Church of Jesus Christ of Latter Day Saints, a non-stock, non-profit trade union-owned corporation and a college controlled by a Board of Trustees. (J.A. 680) Intervenor's Brief below pointed out that in the field of television, the Church of Jesus Christ of Latter Day Saints owns 63.5 percent of the stock of the licensee of KSL-TV in Salt Lake City, 40% of the licensee of KID-TV in Idaho Falls, Idaho, and 5.5% of KBOI at Boise, Idaho. Moody Bible Institute of Chicago, the Christian Catholic Church of Chicago, the Boone Biblical College of Boone, Iowa, University of Notre Dame, and the Lutheran Church-Missouri Synod of St. Louis are other examples of religious organization licensees.

James A. Noe, Sr. of Noe & Company purchased a radio station in New Orleans many years ago which was licensed to the Coliseum Place Baptist Church. See *James A. Noe,* 3 Pike & Fischer, R.R. 1821.

The significant fact, however, is that in all of these cases either the issue of alien ownership or control was not raised, or on the only occasions that it was raised the Commission ruled against the church applicant, at least until the time of its decision in this case.

For example, in *Utah Radio Educational Society,* et al., 3 F.C.C. 246, 255 (1936), the Commission rejected the application of an unincorporated association because the names of all the members composing the Association did not appear of record and therefore it was impossible to determine their citizenship. In *Kansas City Broadcasting Company,* 5 Pike & Fischer, R.R. 1057 (1952), cited by the Court of Appeals in its decision, the Commission rejected the application of a church group because one of the 18 members of its governing board was not a United States citizen. The Commission held in that case that the purpose of Section 310(a) of the Act was to "safeguard the United States from foreign influence in the field of radio . . ." and not solely to prevent "alien activities against the Government during time of war." *Id.* at 1093. It said that it was immaterial in other cases where the issue did not arise that licenses or license renewals may have been granted to unincorporated associations without proper proof of citizenship.

Indeed, in a case involving a business corporation, *Re Crosley, Jr. et al.,* 11 F.C.C. (1945), where the Commission was asked to approve transfer of a license from the Crosley Station (WLW) to the Aviation Corporation, it withheld its approval until more than 40,000

stockholders were polled in order to determine whether Section 310(a)(5) limiting aliens to ownership of not more than 25% of the stock, had been complied with.

The only court references to Section 310(a) which we have been able to find appear as *dicta* in two decisions of the United States Court of Appeals for the District of Columbia Circuit. In *Storer Broadcasting Co. v. F.C.C.*, 220 F. 2d. 204, 95 App. D.C. 97 (1953), while discussing when a hearing is required under the Act, the Court commented that there are situations when the Commission may reject an application without a hearing, as, for example, an application submitted by an alien or one found to be an alien after hearing and denial of alien status. Also in *WOKO, Inc. v. F.C.C.*, 153 F. 2d 623, 80 App. D.C. 33, the Court observed as dicta:

> "Subject to the specific provisions against the ownership or holding of radio station licenses by aliens, foreign governments *or corporations which have an alien tinge through stock ownership*, the Act simply directs the Commission to grant or remove a license if it shall find that the public interest, convenience, or necessity will be served thereby. (Emphasis Supplied)

We do not present the issue of Loyola's eligibility under the statute to hold a television license as either a religious or church issue. We are not here questioning the jurisdiction of the Commission to grant a license to some other church or trade union or other religious or educational group, incorporated or unincorporated, non-profit or profit-making, under circumstances where ownership or control of the group is vested in American citizens. The legal issue is no different than if the applicant were a corporate creation of a labor organi-

zation having some members in the United States but its headquarters and a majority of its membership outside the United States.

We submit the determination of this question by the Supreme Court is of paramount importance to the communications policy of the United States. The United States is one of the few countries in the world which permits any operation of communication facilities, including broadcasting by private enterprise. Until now it was assumed that the regulatory system required that ownership and control of the facilities not be in the hands of non-citizens. If an exception to this requirement is to be made in favor of any corporation or other legal entity owned and controlled in perpetuity by changing groups of members of an alien-controlled Society assigned to their posts by the Society, we think this Court should spell out the reasons for making the exception.

**II. The Court of Appeals has judicially legislated an amendment to Section 310(a) of the Communications Act of 1934 which would make the Section prohibit alien ownership or control only when in the judgment of the Court or the Commission such ownership or control would endanger national security.**

In the Court of Appeals petitioner argued that Section 310(a) was so clear and explicit in its prohibition of the holding of licenses by aliens or representatives of aliens or by corporations whose stock is owned of record or voted by aliens or their representatives that there was no occasion to resort to legislative history as an aid in the interpretation of an ambiguous statute. In this connection we pointed out that the Court of Appeals in the *WOKO, Inc.* case, *supra*, had mentioned the prohibition against the holding by aliens, foreign govern-

ments or "corporations which have an alien tinge through stock ownership . . ." and that the Commission's opinion in *Kansas City Broadcasting Co., supra*, had noted that the purpose of the Section was "to safeguard the United States from foreign influence in the field of radio."

The Court of Appeals ruling disagrees, holding that petitioner's emphasis was "misplaced." (J.A. 678) The opinion then selects two isolated items of evidence put into the record of the House Interstate and Foreign Commerce in 1934 preceding the passage of the Communications Act of 1934 and from this evidence concludes that "although Section 310(a) was directed against alien control of our communications facilities, this limitation was primarily based 'upon the idea of preventing alien activities against the Government during the time of war.' 68 Cong. Rec. 3037 (1927)" (J.A. 679) Since, in the opinion of the Court, the relationship of Loyola to the Society of Jesus "hardly seems to endanger our national security," then even if Section 310(a) "be thought to have a semblance of relevance to the present case, it nevertheless would be inapplicable since it was incorporated into the Communications Act "to guard against alien control and not the mere possibility of alien control.' S. Rep. No. 781, 73d Cong., 2d Sess. 7 (1934)." (J.A. 679-680).

In this fashion the Court of Appeals reads into the language of the 1934 Act both an intention to weaken, rather than strengthen, the prohibitions against alien control which had previously existed and a primary statutory purpose of prevention of alien activities during time of war. We believe a careful reading of the legislative history will not support either premise of the Court of Appeals opinion. Not even Intervenor

went so far as to argue that the Congressional purpose in the enactment of Section 310(a) was limited to the prevention of alien activities against the Government during time of war. It conceded the section came into the Act because "... our government still wishes to keep communications out of the hands of non-citizens." (Intervenor's Brief, pp. 9-10), and then argued that Loyola as a domestic corporation whose officers and directors are American citizens, is not, in the legal sense, controlled by the Society of Jesus, and hence the requirements of Section 310(a) can be disregarded.

To understand how completely the Court of Appeals misunderstood the legislative history of Section 310(a), however, it is necessary to review the evolution of Section 310(a) into its modern form in the Communications Act of 1934. It will then be seen that the language "guard against alien control and not the mere possibility of alien control" meant that the statute was changed in 1934 to eliminate a permissive clause and make it mandatory to deny a license to any corporation, under Section 310(a)(4) whose stock is owned or voted by representatives of aliens.

The Ship Act of 1910[1] was the earliest Congressional legislation concerning radio communications. This Act made it mandatory that passenger ships be equipped with radio apparatus. It was soon followed by the Act of 1912[2] which was passed by Congress in pursuance of the International Radiotelegraph Conventions of Berlin and London. At that time broadcasting did not have the commercial significance it has since acquired and the Act was primarily designed to foster radio-

[1] 36 *Stat.* 629 (1910); 46 U.S.C.A. #484 (1928).

[2] 37 *Stat.* 302 (1912); 47 U.S.C.A. #51-54 (1928).

telegraphy, but the Act required that any applicant for a license in the area covered by the Act must be either a citizen of the United States or a corporation formed under the laws of a state or territory thereof.[3] The purpose was obvious and independent of any wartime experience: Congress wanted to keep communications out of the hands of non-citizens.

With the growth of the radio broadcasting industry Congress moved in 1927 toward more adequate regulation of the new industry and in the Radio Act of 1927 established by statute a Federal Radio Commission with certain powers to regulate radio broadcasting.[4] Section 12 of this statute not only required that an applicant be a citizen of the United States; it also provided that no license could be granted or transferred to an alien person or corporation and that no domestic corporation could hold a license by grant, transfer or otherwise, if any officer or director were an alien or if one-fifth of the voting stock "may" be voted by an alien interest.

Where the Act of 1927 applied only to shares of stock which "may" be voted by aliens or representatives of aliens, the Communications Act of 1934 which overhauled the 1927 Act, was much more stringent and restrictive. It removed the permissive "may" and in its place in the present Section 310(a)(4), substituted specifically the words "owned of record or voted" for the previous reference to shares of stock "which may be voted" by aliens or their representatives. The substitution was intended to strengthen, not weaken the prohibitions against alien influence in the communications field. The full text of the paragraph in *Senate Report*

[3] Id. at Section 52.

[4] Act of Feb. 23, 1927, 44 *Stat.* 1162.

*No. 781*, 73d Cong. 2d Sess. 7, (1934) in which the words "guard against alien control and not the mere possibility of alien control" appear, reads as follows:

> "Section 310(a)(4) modifies the present law by (1) refusing a station license to a company more than one-fifth of whose capital stock is owned of record by aliens, and (2) by changing the words 'may be voted by aliens' in the present law to 'is voted by aliens'. The purpose of this is to guard against alien control and not the mere possibility of alien control."

Thus the mere fact of ownership of stock by aliens or their representatives was enough to disqualify an applicant under the new law, regardless of how the stock was voted, whereas under the 1927 statute only the possibility of voting owned stock disqualified. Stock might be owned under voting trust and other protective arrangements, preventing its being voted. Now, however, ownership alone was to disqualify.

Similarly we think the Court of Appeals has misunderstood the real meaning of the Secretary of Navy's letter of March 22, 1932, from which it quotes a single excerpt as authority for finding that the primary basis for Section 310(a) of the Statute was the idea of preventing alien activities against the government in time of war. (J.A. 678) The excerpt itself refers to two primary bases, not one. These are "the lessons the United States had learned from the foreign dominance of the cables" *and* "the dangers from espionage and propaganda disseminated through foreign-owned radio stations in the United States prior to and during the war." The Secretary of Navy was concerned with both non-war and war experience. He made this evident in the very next paragraph of his letter following the

excerpt quoted by the Court of Appeals, the first sentence of which reads:

> "The great nations of the world fully realize the tremendous importance, *both to commerce and national defense*, of owning and controlling their own radio systems." *Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 26 (1934). (Emphasis supplied)

Later on in his letter he explained again:

> "With these points in mind—commercial and national defense—and realizing the foreign dominance in cables, it must be apparent that no truly international communication system is possible. Nations will not agree to the relinquishing of their leadership in any branch of the field when such factors may affect adversely their *commerce or national defense*. (*Id.* 26-27) (Emphasis supplied)

He looked with "apprehension" on any legislation which permitted communications companies in this country "to be subject to foreign influence." It will be noted that he stressed "subject to foreign influence" and not the ultimate fact of exercise of foreign influence in a manner inimical to the national security.

The second excerpt from the legislative history which the Court cites in support of its view that the primary basis for Section 310(a) was to prevent alien activities against the Government during time of war, involves the testimony of a Captain Hooper, then Director, Communications Division, Office of Naval Operations, who had read the Secretary of the Navy's 1932 letter into the record of the House Committee. The particular comment which the Court of Appeals decision

quotes (J.A. 679) had to do primarily with Section 310(a)(5), the holding company provision, and not with Sections 310(a)(1) and (4). This is apparent from the next two sentences following the sentences quoted by the Court, which read:

> "Now we find that there is a loophole in the law which permits a holding Company not conforming to the original intent of the law to own many foreign and domestic subsidiaries and employ foreigners, although the domestic subsidiaries may themselves comply with the law. I fail to see how this can be proper because if a holding company owns the subsidiary, it dominates its every act." *Id.* 23

Later on in his testimony Captain Hooper made it inescapably clear that his fundamental purpose was "to divorce private radio *absolutely* from foreign control and influence." *Id.* 24. He stressed that ". . . all great nations today insist on 100-percent control of their radio communications, as radio is so vital to *commerce, international relations,* and *national defense* that the communications of such nations are considered by them to be sacred." *Id.* 27 (Emphasis Supplied).

We did not contend in argument before the Court of Appeals or before the Federal Communications Commission that ownership of a television license by Loyola University would endanger the national security. This is a question which is wholly beside the point in this case. Few countries are more closely allied with the United States than Canada in the national security area. It would be almost inconceivable to imagine a situation in which Canadian ownership of a television facility in the United States would endanger our national security. Yet clearly Canadian ownership or control of a television channel in the United States,

except in the percentages permissible under the statute, is prohibited. The point is that Congress did not intend in this statute to leave it to the discretion of the Commission or the Courts to decide in each case involving a foreign influence whether that influence would endanger the national security. Congress legislated on the basis that any holding of a television license by aliens or their representatives or by corporations in which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives was *per se* contrary to the public interest. We wanted to preserve 100-percent control of communications facilities in our own government because these communications are vital to commerce, international relations and national defense.

Is Section 310(a) any less applicable to Loyola University because the University is a non-profit, non-stock corporation? Again the statute is explicit in Section 3(j): the term "corporation" means *any* corporation, joint-stock company, or association.

Finally, are the officers and directors of Loyola University aliens or their representatives? Obviously the American citizens who today comprise the Board of Directors of Loyola are not aliens. But they are and must be to qualify for their positions Jesuit priests subject to the almost military disciplines and hierarchical control of the Order. The Order's membership is dominantly foreign, only 7,500 of its 32,000 members being American citizens. The individuals who appoint the officers and Board are themselves appointed by the Superior General in Rome, who is a Belgian citizen. Even if the Superior General were an American citizen, however, the predominantly foreign complexion of the Order given it by its membership and

organization would not be changed. Any member of the Board of Directors may be removed from office immediately by the simple expedient of his expulsion from the Order or transfer to another assignment on orders initiated from abroad. Loyola University is in every sense the child of the Society of Jesus, created by the Society, controlled by the Society and in the property sense owned by the Society since no other person or group can exercise property rights in the corporation.

The fundamental error of the Court of Appeals is that on its own initiative it has read into an otherwise clear statute an amendment which permits the Court to ignore the statute upon a judgment that a specific alien-controlled organization does not now endanger our national security. This is error—and serious and important error.

## CONCLUSION

For the reasons stated it is respectfully submitted that the petition for certiorari should be granted.

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